

**FEB 21 2006**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

KEVIN SLAPE,

Plaintiff - Appellant,

V.

CITY OF LONG BEACH; K. KLEIN,  
individually and as a peace officer #5637;  
A. ALU, individually and as a peace  
officer #5653,

Defendants - Appellees.

No. 04-55881

D.C. No. CV-00-12861-JFW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
John F. Walter, District Judge, Presiding

Submitted February 6, 2006<sup>\*\*</sup>  
Pasadena, California

Before: BEEZER, T.G. NELSON, and GOULD, Circuit Judges.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff Kevin Slape appeals the district court's denial of his second motion to set aside the district court's order of dismissal. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

We only have jurisdiction to review Slape's second motion to set aside the dismissal order. We lack jurisdiction to review the underlying dismissal order and Slape's first motion to set aside that dismissal because Slape did not timely appeal.<sup>1</sup>

The district court was within its discretion<sup>2</sup> when it denied Slape's second motion because Slape and his counsel ignored the court's guidance to resubmit the second motion under Federal Rule of Civil Procedure 60(b). By re-characterizing Slape's first motion as one under Rule 60(b) and citing relevant precedent,<sup>3</sup> the court effectively instructed Slape on the applicable rule, Rule 60(b), and indicated that the rules under which Slape had filed his first motion, Federal Rule of Civil

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<sup>1</sup> Fed. R. App. P. 4(a)(1); *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989) (noting that an appeal from a denial of a request for relief from judgment under Federal Rule of Civil Procedure 60(b) brings up for review only that denial and not the underlying judgment).

<sup>2</sup> *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) (citing standard of review).

<sup>3</sup> The district court specifically cited to both Rule 60(b) and *Ashford v. Stuart*, 657 F.2d 1053 (9th Cir. 1981) (per curiam), a case addressing Rule 60(b) motions.

Procedure 41 and Central District Local Rule 41-3, were not applicable. Thus, when Slape ignored the court's instruction and filed a second motion improperly relying on a local rule, the district court was within its discretion to deny the motion.

**AFFIRMED.**